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A Theory of the Charter

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A THEORY OF THE CHARTER*

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A constitution is the way of life of a citizen-body.

–Aristotle[1]

Canadian legal thought has at many points in the past deferred to that of the British; the *Charter* will be no sign of our national maturity if it simply becomes an excuse for adopting another intellectual mentor.

–Justice La Forest[2]

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[1] E. Barker, ed., *Politics*, trans. E. Barker (Oxford: Oxford University Press, 1958) at 180.

[2] *R.* v. *Rahey*, [1987] 1 S.C.R. 588 at 639.

I. INTRODUCTION

Does the *Canadian Charter of Rights and Freedoms*[3] elevate judges to a dominant position in the Canadian Constitution? Many commentators on the *Charter* seem to think so. Some of them, moreover, hold that this is an unfortunate and undemocratic turn of events, while others applaud the move. Since the *Charter* came into force, there has been persistent debate over the role of the judiciary in applying its terms. What is interesting about this debate is that it assumes that the Canadian *Charter* is basically similar to the American *Bill of Rights* and that the American experience is crucial to understanding the position here.[4] I think that this assumption is wrong and the debate is misguided. Dazzled by the powerful headlights of American constitutional doctrine, we are drawn onto highways running from places we have never been to places we may not want to go.

The *Charter* is strikingly different from the American *Bill of Rights*. And it is different, not only in the range and character of the rights it protects, but in crucial structural ways. The most notable difference is that section 33 of the *Charter* allows legislatures to enact "notwithstanding clauses" that shield statutes from judicial scrutiny for conformity with many *Charter* provisions.[5] One would have thought that this provision would figure prominently in any debate about the relative roles of legislatures and courts under the *Charter*. But curiously this has not been the case. Section 33 is usually ignored or treated as an embarrassment. The reason, it appears, is that it does not "fit" the terms of reference supplied by American constitutional theory. Deprived of guidance

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[3] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[4] See, for example, the discussion of section 7 of the *Charter* in P. J. Monahan and A. Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 Sup. Ct L. Rev. 69 at 78-95.

[5] For detailed discussion of this section, see text below at footnotes 60-66.

from south of the border, we seem at a loss what to make of the provision.

Section 33 is perhaps the most fundamental distinguishing feature of the Canadian *Charter*. But it is not the only one. In section 1, the *Charter* allows for the imposition of reasonable limits on *Charter* rights, a feature notably absent from the American *Bill of Rights*. Although there has been a lot of discussion regarding the kind of limits this clause permits and how a court should go about determining them, there has been scarcely any recognition of the possibility that the provision allows for significant *dialogue* between the courts and legislatures over the reasonableness of limits. This potential for a democratic and flexible application of the *Charter* has been overlooked, once again apparently because it contradicts basic assumptions of American constitutional theory.[6]

Other important differences between the *Charter* and the American *Bill of Rights* might be pointed out. But my aim here is not to compare the two documents; it is to open up the discussion of the Canadian *Charter* in a way that frees us from the dominance of American theory.[7] I will explore a mode of thinking about the *Charter*'s basic structure that departs from the one tacitly informing most current thinking about the *Charter*, but which I think is more faithful to the text and spirit of the document and, of equal importance, to our constitutional heritage. Ultimately any theory of the *Charter* should be judged, not by its conformity to some pre-existing model, whether this be the American *Bill of Rights* or the

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[6] The section is considered at greater length below, in the text accompanying footnotes 46-59.

[7] I am following here the lead of the Supreme Court of Canada in *Re Section 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 (S.C.C.), where Lamer J. wrote at 545-46 with reference to an argument presented concerning the scope of section 7 of the *Charter*:

> It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the United States Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two Constitutions.

European Convention on Human Rights, but by its ability to display the *Charter* as the development and extension of the best of Canadian constitutional traditions.

II. TWO MODELS OF THE *CHARTER*

The dominant school of thought on the *Charter* is presented with characteristic clarity by Peter Hogg in a passage from his *Constitutional Law of Canada*:

> The *Charter* of Rights, like any other bill of rights, guarantees a set of civil liberties that are regarded as so important that they should receive immunity, or at least special protection, from state action. *This purpose is accomplished through the courts.* If a law (or a governmental act) is challenged, and if it is found by a court to violate one of the civil liberties guaranteed by the *Charter*, the court will declare the law (or act) to be nugatory. In that way, the guaranteed civil liberties are protected from the actions of Parliament, Legislatures, government agencies and officials.[8]

This school, then, portrays the *Charter* as empowering the courts to review governmental acts for unjustified violations of basic rights and to supply remedies to aggrieved parties. The tacit assumption is that the roles of governments and legislatures under the *Charter* remain basically the same as in the pre-*Charter* era: to make laws and implement them. The judiciary is thus like a gardener bringing order to an overgrown garden, or a day-care worker tending a bunch of lively pre-schoolers. Governments and legislatures are equivalent to forces of nature, working sometimes for good and sometimes for ill, but at any rate driven by factors alien to those animating the *Charter*. It is not for these bodies to apply the *Charter* to themselves, for they are not well-equipped to do so. The *Charter* is for judges, not politicians and civil servants.[9]

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[8] P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell Company, 1985) at 651, footnote omitted, emphasis added.

[9] This view permeates the writings of most *Charter* commentators, of all political stripes. Thus, such detractors of the *Charter* as Monahan and Petter write, *supra*, note 4 at 84-85: "...the language of the Charter is so broad and amorphous *that it leaves for judicial determination* not only the precise nature and scope of certain Charter rights, but whether those rights exist at all" (emphasis added).

Upon examination, this viewpoint can be seen to involve three related propositions. The first of these holds that the *Charter*'s main effect on governmental bodies is to limit their powers, so that acts in excess of these limits are invalid. That is, the *Charter* does not impose *duties* on government; it creates *disabilities*. It does not generally oblige governmental bodies to act in any particular way; it merely states conditions under which governmental action will be valid and effective. The second proposition holds that the *Charter*'s purposes are achieved through the courts, which are authorized to strike down governmental acts that violate the *Charter*. So, the courts have an exclusive and final say on the interpretation of *Charter* provisions and their application to governmental acts. The final proposition affirms that the judicial function is confined to reviewing governmental acts; it does not extend to rewriting the terms of statutes or to revamping the common law governing private relations.

Not every adherent to this viewpoint subscribes to all three propositions.[10] But, taken together, they represent a model of the *Charter* which has gained widespread acceptance, both in the legal community and among the general public. I will call this view the Judicial Model, because of the central role it assigns to the courts.

The Judicial Model is supported not only by popular conceptions of the American Bill of Rights,[11] but also by certain strands of positivist legal theory, represented most strikingly by H.L.A. Hart's influential *Concept of Law*.[12] Hart's analysis suggests that modern Anglo-American constitutions can be understood without reference to the notion of constitutional duty, which is relegated to a peripheral and unessential role. This theme, which recurs at many points throughout the work, is stated briefly as follows:

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[10] Peter Hogg, for example, does not fully subscribe to the last proposition, holding that, under the *Charter*, courts may in some instances reform the common law governing private relations; see discussion in *Constitutional Law of Canada*, *supra*, note 8 at 672-78.

[11] It may be pointed out that the American position on these matters is arguably more modulated than these ideas acknowledge.

[12] (Oxford: Clarendon Press, 1961), *passim*, but esp. at 26-41, 64-69.

> A constitution which effectively restricts the legislative powers of the supreme legislature in the system does not do so by imposing (or at any rate need not impose) duties on the legislature not to attempt to legislate in certain ways; instead it provides that any such purported legislation shall be void. It imposes not legal duties but legal disabilities. "Limits" here implies not the presence of *duty* but the absence of legal power.[13]

This denial of the importance of constitutional duty lies at the heart of the Judicial Model of the *Charter*. It is also the source of much mischief. For despite its initial plausibility, the Judicial Model is, I think, seriously misleading. In concentrating on the review functions of courts under the *Charter*, it gives a partial and distorted account of the document, which leads to consequences that we would all, in the end, recognize as erroneous.

This is not the place to trace in detail the similarities between the Judicial Model and Hart's legal theory or to provide a critique of the positivist portrayal of constitutional law. My goal rather is to construct an alternate model of the *Charter* that better captures the multi-faceted nature of the document. Interestingly, this model has found its strongest support to date, not in academic commentaries on the *Charter*, but in the opinions of the Supreme Court of Canada.[14] Nevertheless the model is found there only in a fragmented and inchoate form; it has yet to be fully articulated, much less accepted.

This alternate model holds that the *Charter* sets up a complex scheme of constitutional duties and review powers that are distributed among governments, legislatures, and the courts. These bodies are equally mandated to pursue the *Charter*'s goals, which ultimately represent aspects of the common good of the community

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[13] *Ibid.* at 68 (emphasis in original).

[14] For an outstanding early exception, see P.H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 C.B.R. 30 esp. at 44-49.

as a whole.[15] Like physicians tending to the health of a community, they work from a shared body of knowledge and traditions and are committed to a broadly similar set of goals. Yet they differ somewhat in their particular aptitudes, experience, and expertise, and sometimes also in their assessment of what ails members of the community and the proper course of treatment. Citizens dissatisfied with treatment received from one body may seek a second opinion, and the body rendering that opinion may take into account the credentials of the first. Although the various bodies may at times be at odds with one another, they more usually work in a coordinated way, for only thus are they able to achieve the broader goals they all share. Each body recognizes that it would be unable to minister alone to the needs of the entire community and that the pool of wisdom present in the group as a whole is far greater than that held by any single member. This model of the *Charter*, then, lays stress on the equal responsibilities of the various branches of government to carry out the *Charter*'s mandate and the reciprocal nature of their roles. I will call it the Coordinate Model.

An important feature of the Coordinate Model is the distinction it draws between first-order and second-order functions under the *Charter*. On this view, the *Charter* has two sorts of binding effects. First, it directly obliges a range of governmental bodies to act (or refrain from acting) in certain ways. Specifically, it obliges them to assess the reasonableness of *their own* anticipated acts in light of fundamental rights and to act accordingly. This may be called a first-order function. The *Charter* also authorizes and binds certain bodies to review the acts of *others* for conformity with *Charter* rights where the latter are bound in a first-order way to take account of the *Charter* in acting. This may be called a second-order

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[15] As Dickson C.J.C. observes in *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200 at 225 (S.C.C.): "The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified." For a stimulating presentation of human rights as aspects of the common good, see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) esp. at 210-18.

function because it involves making judgments over the shoulder of another, usually after the fact.[16]

The *Charter* imposes first-order duties on three sorts of governmental bodies: the executive, the legislature, and the courts. Each of these branches of government has the constitutional duty to comply with the *Charter*, regardless of whether any other body can enforce this obligation. This proposition is implicit in section 32(1) of the *Charter*, which states that the *Charter* applies to the Parliament and government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective spheres. Although the section does not specifically mention the courts, there can be no doubt that they are bound by the *Charter* as part of their general duty to apply the law.[17] The point emphasized by the Coordinate Model, however, is that it is not *only* the courts that are bound in a first-order way by the *Charter*, but the executive and legislative branches as well.

The Coordinate Model maintains that the *Charter* can fulfil its proper role only to the extent that the bodies bound in a first-order way accept the mandate to carry out its guarantees. As Marc Gold has observed, "the main objective of a Charter of Rights is to provide a legal framework within which government will act justly in pursuit of the common good."[18] On this view, the role of review bodies, while significant, is secondary. By way of analogy, the rules of a game such as hockey are directed not only at the referees, but more importantly at the players. Obviously, if the game is to be

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[16] I say "usually" because there is the possibility of a court being asked, on a reference, about the constitutionality of *proposed* legislation. In light of arguments developed below, such reference cases deprive a court of an important ingredient in its decision, namely the judgement of the body holding first-order duties under the *Charter*, and should perhaps be discouraged.

[17] In *R.* v. *Rahey*, *supra*, note 2 at 633, La Forest J. observes: "... it seems obvious to me that the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties." See also *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd* (1986), 33 D.L.R. (4th) 174 (S.C.C.), where McIntyre J. states at 196: "The courts are, of course, bound by the *Charter* as they are bound by all law."

[18] M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Sup. Ct L. Rev. 131 at 155.

played at all, the players must internally adhere to the rules and guide their behaviour by reference to it. No doubt the referees have ultimate say as to what the rules require and whether they have been followed by the players. But this does not mean that the referees alone, and not the players, are bound by the rules. For the game consists of what the players do, and what they do makes sense only if it is guided by an adherence to norms accepted as common standards for all those playing the game. And indeed we know that games can be played successfully without referees. But they cannot be played with only referees.[19]

The Coordinate Model argues, then, that the proper functioning of the *Charter* depends less on the activities of those responsible for policing others than on the activities of those bound in a first-order way by its provisions. This does not mean that second-order functions are unimportant. But it does mean that second-order bodies acting alone are incapable of ensuring that the values implicit in the *Charter* guarantees are properly carried out in Canadian society. As Jim MacPherson has observed in another context:

> In reality a decision by the Supreme Court of Canada is only one statement in a continuous conversation among citizens, governments, and the Court. Citizens speak, governments respond, and the Court evaluates. But the Court's evaluation is not the final word. It invites a further response, either approval or condemnation, from citizens or governments. And if that further response is condemnation, there are tools available for altering the Court's position.[20]

The point being made here does not simply concern the relative importance of legislatures and courts. For, as we will see in more detail later, the Coordinate Model argues that both first and second-order duties are distributed among the various branches of government. Thus the judiciary has important first-order functions under the *Charter*, along with the legislative and executive branches.

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[19] The example is adapted from one used in another context by H.L.A. Hart in *The Concept of Law*, *supra*, note 12 at 55-56, 138-41. However, as just noted, the Coordinate Model of constitutional law is quite different from that implied in Hart's work.

[20] J.C. MacPherson, "The Potential Implications of Constitutional Reform for the Supreme Court of Canada" in S.M. Beck & I. Bernier eds, *Canada and the New Constitution: The Unfinished Agenda*, Vol. 1 (Montreal: Institute for Research on Public Policy, 1983) 161 at 177.

And the judiciary is not the only institution with second-order review functions. Legislatures have the power to scrutinize court decisions and executive acts for *Charter* compliance and to enact corrective statutes, and such statutes can be shielded from judicial review by notwithstanding clauses under section 33.

Generally the Coordinate Model holds that the *Charter* allows for a continuing dialogue between the courts and legislatures as to the true nature of *Charter* rights and the reasonableness of limits on them. But this dialogue can occur only if it is accepted that the roles of the executive, legislative, and judicial branches under the *Charter* are reciprocal and not confrontational and that their attitudes to one another should be flexible and founded on mutual respect.[21]

The Coordinate Model recognizes, of course, that the same body may have both first and second-order functions under the *Charter*. Courts are clearly in this position, for the *Charter* directly binds them to act in certain ways and also to review the acts of others. Moreover both sorts of functions may merge in a single act. Take the example of a court required to apply a statute authorizing capital punishment and so doing to determine whether it violates the *Charter* guarantee against cruel and unusual punishment.[22] Here the court has to assess the validity of its own prospective act (the imposition of a sentence) and at the same time the validity of the statute passed by Parliament. More generally it can be argued that whenever a body exercises a second-order function under the *Charter*, it also exercises a first-order one. Thus where a court reviews a statute for conformity with the *Charter*, it is itself bound to observe the terms of the *Charter* in making its assessment. In effect the court has a first-order duty to exercise a second-order power of review.

The Coordinate Model also maintains that a body may hold first-order obligations under the *Charter* even where there is no other body capable of reviewing its acts. In other words, the

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[21] See further D. Mullan, "Judicial Deference to Administrative Decision-Making in the Age of the Charter" (1985-86) 50 Sask. L. Rev. 203 at 219-20; Justice D.G. Blair, "The Charter and the Judges: A View from the Bench" (1983) 13 Man. L.J. 445 at 446-47.

[22] Section 12.

existence of first-order duties does not depend on the existence of second-order ones, just as the existence of second-order duties does not depend on the existence of third-order ones. Otherwise we are lead down an endless staircase in search of an ever-retreating foundation. Either we accept that constitutional duties may exist even where no further level of scrutiny exists, or we deny the existence of such duties altogether.

The point may be illustrated by an example drawn from a non-*Charter* context. Consider the position of a court called upon to apply the terms of a statute to a civil dispute where no appeal lies from the court's judgment to a higher court, as is the case with the Supreme Court of Canada. If the statute actually applies to the dispute, we would say that the court has a first-order *duty* to apply it. But it could be objected that, since no other body can review the court's decision, the court may in fact do as it pleases and that it is simple mystification to say that it has a duty to apply the statute. This viewpoint, however, does not correspond to our shared notions of how judges ought to behave or to the ideas of judges themselves; and standard judicial oaths to uphold the law reflect this fact. It seems truer to our understanding of constitutional practice to say that the court has a first-order duty to apply the statute, even in the absence of a second-order power in another body to review its acts.[23] In the same way (argues the Coordinate Model), courts, legislatures, and governments have first-order duties to apply the *Charter* in pursuing their accustomed roles even though sometimes there may be no other bodies with the authority to supervise their decisions. The significance of this point will be become apparent later.

We have identified, then, two contrasting models of the *Charter*. But, you may ask, does it really make much difference in

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[23] This view, in fact, is the basis of the famous holding of the U.S. Supreme Court in *Marbury* v. *Madison*, 1 Cranch 137 (1803), where Chief Justice Marshall said at 177-78:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution ... the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

practice which model we adopt? True, the Coordinate Model offers a more complete understanding of the *Charter* at the theoretical level, but when it comes to the *Charter*'s concrete application does it matter? The rest of this paper represents an attempt to show that it does indeed matter, that our answers to some of the most important questions about the *Charter*'s operation are influenced by the model we adopt. The fundamental reason for this can be stated briefly.

At first sight, the two models may seem like rival ways of *describing* or *explaining* the *Charter*. In fact, they are not just descriptive or explanatory, or even primarily so. In setting out the roles played by various constitutional bodies, they effectively specify what these bodies *ought and ought not to be doing*. They thus have the potential, if accepted, to influence the actions of the constitutional actors themselves. To adopt one model over another is not simply a matter of determining which one better "fits the facts"; it is a matter of determining what the facts will eventually be. For regardless whether we view the Constitution on the Judicial or Coordinate Model, we as citizens make up the entity being described and have the capacity to determine its basic character.

This, however, is just a preliminary answer, to be elaborated as we proceed. First, we will examine more closely the major point activating the Coordinate Model – the insistence that first-order duties are central to a proper understanding of the *Charter*. We will then review relations between first-order and second-order actors, dealing specifically with sections 1 and 33 of the *Charter*. I should remind the reader that my analysis does not necessarily reflect the current state of jurisprudence on the *Charter*. The aim is to articulate a better framework for understanding the *Charter* than the one now available.

III. FIRST-ORDER DUTIES

As just seen, the Coordinate Model holds that the *Charter* does not simply mandate courts to review the acts of other branches of government for violations of basic rights: more importantly, it provides a constitutional code of behaviour directly regulating

governmental activities as a whole.[24] What does this mean in practice? Here I will draw out some of the main implications of this view, dealing first with the executive and legislative branches, and then with courts and administrative tribunals. What follows takes the form of a sketch-map , which suggests in a few strokes the shape of a country still barely explored. Like early maps of America, it may display geographical features that later prove speculative or misplaced, and the map's overall dimensions may be somewhat off. But, as with America, this does not mean that the continent itself is a myth.

A. *The Executive and Legislative Branches*

The Coordinate Model holds that the duty to observe *Charter* standards affects every aspect of the process by which laws are enacted and implemented, including the formation of the initial policy, the drafting of the detailed provisions of a bill, the debates in the legislature and legislative committees, the voting of individual members of the legislature, the drafting of statutory orders and regulations, and the exercise of any powers conferred by the statute or its regulations. In principle, every person or body involved in this process has the responsibility to advert to *Charter* standards in making decisions that fall within that person's competence. In practice, of course, the nature and extent of the responsibility will vary considerably, depending on the character of the function exercised and the capacities and resources of the person or body exercising it. As will be explained at greater length below, there is more than one way to implement *Charter* standards; it would be wrong to assume that the judicial mode is the only one or the best.

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[24] This view accords with the general position adopted by the Supreme Court in *Re Language Rights under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1 at 19 (S.C.C.), where it affirms: "The constitution of a country is a statement of the will of the people *to be governed* in accordance with certain principles held as fundamental..." (emphasis added). The Court holds that section 23 of the *Manitoba Act, 1870* "...establishes a *constitutional duty* on the Manitoba Legislature with respect to the manner and form of enactment of its legislation. This duty protects the substantive rights of all Manitobans to equal access to the law in either the French or the English language." *Ibid.*, emphasis added. It goes on to say: "The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution."

Since the government of the day normally initiates and drafts legislation and oversees its passage through Parliament, it carries the main responsibility of ensuring that the legislation does not intrude unduly on *Charter* rights.[25] This point has so often been overlooked by commentators mesmerized by judicial review that it deserves particular emphasis. In the ordinary case, bills introduced by a majority government pass into law without major amendments. So a governmental decision that a bill can be justified under the *Charter* will temporarily carry the day and, unless later challenged successfully in court, will have permanent effects on the rights of ordinary Canadians. Only a selection of laws can ever be effectively subjected to judicial review, which, in any case, is a lengthy and expensive process. Courts have only a limited capacity to assess the correctness of governmental decisions on crucial aspects of public policy and so (quite properly in many instances) may feel constrained to defer to the wisdom of the government on these points. It follows that for a government to adopt the attitude of "pass now, justify in court later" would not only be an abdication of its *Charter* responsibilities, but in fact would undermine the foundations of judicial respect for the decisions of coordinate branches of government.

What holds true of the executive also applies to legislatures. As already pointed out, the power of a legislature to alter a bill introduced by a majority government is limited in a modern parliamentary system. This fact does not release members of parliament from their constitutional duty to scrutinize bills for possible violations of *Charter* standards. To carry out the duty properly, it may be necessary to establish a special committee with the mandate to consider how proposed legislation may affect basic rights and to propose suitable amendments.

The observations made above with respect to statutes apply with equal force to statutory orders and regulations, which put flesh

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[25] By way of parallel, section 3 of the *Canadian Bill of Rights*, S.C. 1960, c. 44, R.S.C. 1970, Appendix III, provides that the federal Minister of Justice shall examine every proposed regulation and every Bill in order to ascertain whether any provisions are inconsistent with the *Canadian Bill of Rights*. For discussion of the implementation of this section, see W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McClelland and Stewart, 1975) at 125-28.

on the bones of much modern legislation. Regulations often have as much potential to affect basic rights as do their governing statutes, and yet they usually escape effective legislative scrutiny. All the more reason, then, that governments should set up mechanisms to screen draft regulations for possible *Charter* violations. Such mechanisms should allow for the possibility of effective public representation so as to provide a broad and informed basis for decision-making.

The duties of governments and legislatures include not only the scrutiny of proposed legislation and regulations, but also the review of laws on the books at the time the *Charter* took effect. Interestingly, a number of governments have already taken this responsibility to heart. To cite only one example, in 1984 the government of Saskatchewan published a discussion paper which singled out forty-five provincial laws as being in clear violation of the *Charter*,[26] and the following year it passed an omnibus bill amending or repealing the laws in question.[27] As recounted by Jim MacPherson, who was then Director of the Constitutional Law Branch for the Saskatchewan Ministry of Justice, "If, at any time before that Act was passed, any of these laws had been challenged our position would have been not to defend them."[28]

The same constitutional duties that bind a government in its legislative functions also affect its strictly executive activities, in the exercise of prerogative and statutory powers and generally in the administration of the law.[29] The implication is that governmental

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[26] Government of Saskatchewan Discussion Paper; *Compliance of Saskatchewan Laws with the Canadian Charter of Rights and Freedoms* (1984).

[27] The Canadian Charter of Rights and Freedoms Consequential Amendment Act, Bill No. 41, 1984-5.

[28] J.C. MacPherson, "Litigating Equality Rights," in Smith et al. eds, *Righting the Balance: Canada's New Equality Rights* (1986), 231 at 235.

[29] As Justice Dickson (as he then was) held in *Operation Dismantle* v. *The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.) at 491, "... the executive branch of the Canadian Government is duty bound to act in accordance with the dictates of the *Charter*," and this duty extended to the federal Cabinet; see also *ibid.* at 485. In *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500 at 518, La Forest J. held: "There can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the

officials and administrative boards generally are obligated to observe applicable *Charter* standards in carrying out their legal functions, either because the law governing their powers must now be interpreted in light of the *Charter*, or because the officials themselves, as governmental agents, are directly bound by the *Charter*'s overriding provisions.[30] We will look at this subject in more detail later.

It is useful to pause here and consider the contrasting position that the Judicial Model adopts on these matters. That Model holds that the executive and legislative branches of government have no duty to abide by *Charter* standards in determining a course of action, even (it would seem) when courts have already ruled that certain actions violate the *Charter*. For if a government is not obligated by the *Charter* from the start, it is not easy to see why court decisions should make it so. Thus the only considerations governing a government's behaviour are prudential: a cautious government will weigh the possibility of "being caught" against any advantages to be gained by taking an unconstitutional course of action. Even where it knows that a bill violates the *Charter*, having been told so by its law officers, it might nevertheless decide to introduce it into Parliament in the hope that its purposes will be sufficiently served even if the legislation is eventually struck down by the courts, given the time that may elapse before a final

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Charter (s. 32)"; at 520-21, La Forest J. held that "[t]he pre-eminence of the Constitution must be recognized; the treaty, the extradition hearing in this country and the exercise of the executive discretion to surrender a fugitive must all conform to the requirements of the *Charter*, including the principles of fundamental justice." Similarly in *Jones* v. *The Queen* (1986), 31 D.L.R. (4th) 569 (S.C.C.), La Forest J. stated at 593: "Those who administer the province's educational requirements may not do so in a manner that unreasonably infringes on the right of parents to teach their children in accordance with their religious convictions. The interference must be demonstrably justified." See also the remarks of McIntyre J. in *Retail, Wholesale & Department Store Union, Local 580* v. *Dolphin Delivery Ltd* (1986), 33 D.L.R. (4th) 174 at 195 (S.C.C.) [hereinafter *Dolphin Delivery*].

30 This does not mean, of course, that such officials are bound by each and every *Charter* provision, simply that they are bound by such provisions as actually apply to them, a matter determined by the scope of each individual provision.

judicial ruling is rendered.[31] It need hardly be said that a governmental attitude of this kind is at odds with the spirit of the *Charter* and our constitutional traditions.

So far we have talked as if the duties imposed by the *Charter* were largely negative, involving the exercise of restraint. But governments and legislatures also have positive duties under the *Charter*. To cite several obvious examples, the Canadian Parliament and provincial legislatures are obliged to sit at least once every twelve months; the statutes, records, and journals of the Parliament of Canada and also the New Brunswick legislature must be published in both English and French; and institutions of the same two legislatures have a duty to communicate with members of the public in both languages.[32] The *Charter* also sets out extensive governmental responsibilities regarding minority language education.[33]

Beyond specific duties of this kind, governments and legislatures have broad constitutional obligations to act affirmatively in furtherance of certain *Charter* rights.[34] The *Charter*'s potential to promote beneficial governmental activity is well expressed by Justice Lamer in his opinion in *Mills* v. *The Queen*,[35] where he reflects on the effects of section 11(b), which guarantees the right of an accused person to be tried within a reasonable time:

> Our legislators have, by the entrenchment of section 11(b), established as a fundamental societal priority the maintenance of an effective and prompt system for

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[31] This is particularly true if courts will not issue an interlocutory injunction suspending the operation of the legislation pending final determination of the question; see, on this point, *Attorney General of Manitoba* v. *Metropolitan Stores Ltd*, [1987] 1 S.C.R. 110.

[32] See sections 5, 18, and 20.

[33] Section 23.

[34] As Dickson C.J.C. has noted in a speculative way, there are "situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms (for example, regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press);" *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 361.

[35] (1986), 29 D.L.R. (4th) 161 at 234-35 (S.C.C.). Lamer J. was dissenting, but not on this point.

> the administration of criminal justice. There can be no assumption that the constitutional right to be tried within a reasonable time must conform to the status quo; rather, it is the system for the administration of criminal justice which must conform to the constitutional requirements of the *Charter*.

Thus, the section provides a mandate for affirmative measures by both the executive and legislative branches:

> In some areas of the country, delays in bringing accused to trial might well be wholly unacceptable and significant efforts will be required to meet the test of section 11(b). It may well be that the criminal justice system as a whole will have to be accorded greater priority; it may also mean that within the criminal justice system greater priority will need to be given to providing sufficient resources, both human and financial, for the courts and the Crown offices.

But (to anticipate our next subject) executive bodies and legislatures are not the only ones affected by the *Charter*:

> Under section 11(b), the courts cannot simply admonish the executive or legislative branches for failure to meet the requirements of the *Charter*; we must now look to ourselves and determine whether the judiciary is adequately responding to the demands of the *Charter* as well. Although all branches of government have a measure of responsibility, the judiciary must play a central role in ensuring that the right to be tried within a reasonable time is not frustrated by systemic delay.

Governmental obligations to act in furtherance of *Charter* rights may exist regardless whether they can be effectively enforced in a review court. It is a mistake, as pointed out earlier, to think that the existence of a first-order constitutional duty depends on the existence of a second-order power to enforce it. In such matters, a review court might have, at most, the power to declare in general terms that some such duty exists, without being able to order compliance, thus leaving decisions as to the manner and extent of implementation to the executive and legislature. But even the complete absence of a declaratory power in the courts would, on this view, not affect the existence of a first-order duty binding governments.

The point being made here is that the *Charter*'s potential is not limited to what may be accomplished through judicial action at the review stage. Some may find it difficult to credit the existence of governmental and legislative duties in the absence of a judicial power to enforce them. Doubters should reflect again on the fact that courts are commonly thought to be constitutionally accountable for carrying out the *Charter* even though there may be no external

body capable of holding them to their task. In the same way, it is argued, governments and legislatures are constitutionally bound to have regard to the values represented in the *Charter* even when the courts cannot directly compel them to do this. The point is crucial to a proper understanding of notwithstanding clauses under section 33, as we will see later. But it also affects the overall way that we conceive of the *Charter*.

The proposition that governments and legislatures are bound to advert to *Charter* standards in their activities does not mean that they have to proceed in the same manner as courts. We have to banish the notion that the only proper mode of applying the *Charter* is the judicial one, characterized by a slow and deliberate adversarial process featuring arguments by the parties affected and a reasoned decision. Such a process may be neither possible nor desirable in the case of many governmental actors.

By the same token, to observe that an official need not mimic a court when making a decision that affects *Charter* rights does not entail that the official need not apply *Charter* standards. To take an obvious case, police officers must take account of the *Charter* guarantee against arbitrary detentions in deciding whether or not to make an arrest.[36] But this does not mean that they have to entertain legal argument or give considered reasons before proceeding, only that they should use their best judgement in the matter, for the occasion may permit them time to do little more.

The example gives rise, however, to another question. How can we realistically expect the ordinary police officer to apply *Charter* standards in making arrests when the *Charter* provision in question is worded so generally, speaking only of the "right not to be arbitrarily detained or imprisoned." How can the officer be expected to know when an arrest is "arbitrary"? On one view the police must await the development of authoritative standards by the courts that indicate in greater detail the situations when arrests violate the injunction against arbitrariness. This view has some truth, because over time the courts will in fact develop a body of jurisprudence governing the application of section 9 that will provide some authoritative guidance to police officers in the performance

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[36] See section 9 of the *Charter*.

of their duties. But to suggest that the courts *alone* are responsible for the development of these standards seems wrong. First-order actors usually possess a knowledge of the concrete situation that is denied to the courts. They may thus be better placed than judges, in some respects at least, to lay down workable standards governing arrests. This reflection suggests that police officers should play an active role in the formation of such standards.

How can they do this? A number of ways may be suggested. Police departments and organizations, in consultation with relevant governmental officials, should draw up guide-lines governing arrests that in their view satisfy *Charter* standards and at the same time allow the police to carry out their duties effectively. When the Supreme Court comes to making decisions on these matters, it will have the benefit of police thinking and experience – which it will, of course, have to weigh along with other considerations.

What, then, is the role of the police once the Supreme Court starts to build up a substantial body of precedents governing the application of section 9 to arrests? Clearly it would be irresponsible of the police to disregard these rulings and follow their better judgement. But it would be equally wrong of the police to remain completely passive in the face of rulings that they consider misguided. Their job is to make use of judicial rulings to achieve a workable application of *Charter* standards. In doing this they are entitled to a certain leeway under the provisions of section 1, a subject that we will examine later. The general point to be made here is that the judiciary does not, by its own confession, have a monopoly on the reasonable application of *Charter* standards, all the more so when they have little or no practical experience or special expertise in the matter at hand.

B. *Courts*

What first-order obligations do courts have under the *Charter*, apart from any second-order powers of review that they possess? In what cases is a court directly bound by the *Charter* to act in contexts where it is not concerned with judging the actions of other first-order actors for conformity with the *Charter*?

There are several instances where the judiciary has pure first-order functions under the *Charter*. The first is where a court is

directly obliged by a particular *Charter* provision to act (or refrain from acting) in a certain manner.[37] A second instance arises when a court, as part of its general obligation to apply the *Charter*, is required to scrutinize a statutory provision enacted at a date before the *Charter* took effect. A third occurs when a court is obliged to modify common law rules so as to bring them into conformity with the *Charter*. A fourth arises when a court carries on its normal duties of interpreting enactments and applying them to concrete situations. As we will see, the lines between these cases cannot be firmly drawn in practice, but the scheme has the virtue of indicating in a common-sense way the main areas of concern.

The first case is illustrated by section 13 of the *Charter*, which specifies that witnesses who testify in any proceedings have the right not to have their testimony used to incriminate them in any other proceedings except in a prosecution for perjury or for the giving of contradictory testimony. Under this section, a court has a direct obligation to exclude testimony that would unjustifiably violate this right.[38] In the course of carrying out its first-order duty, a court must determine what section 13 actually requires and what limits are permissible under section 1. In the absence of statutory limitations on the right (which is the case under consideration), the court will have to determine whether any common law limits are reasonable and justified. But the courts are themselves the authors of the common law and possess a general power to remould and reform it. It follows that courts may have to modify existing common law restrictions on the right or impose new ones. In such cases the judiciary is both author of these limits and judge of their compliance with section 1, a proposition that is only superficially paradoxical.

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[37] I am excluding here the case where the court's decision to carry out its *Charter* duties is affected by the existence of a statute passed after the *Charter* took effect. If a statutory provision of the latter kind stands in the way of a court carrying out a prima facie duty under the *Charter*, the court will necessarily embark on an enquiry as to whether the provision conforms with the *Charter*, which is a second-order function. In such a case, as noted earlier, the court's inquiry will have a mixed aspect, because the court will have to review the act of a legislature (a second-order function) in the course of determining what its own first-order duties under the *Charter* are.

[38] See *Dubois* v. *The Queen* (1985), 23 D.L.R. (4th) 503 (S.C.C.), and *R.* v. *Mannion* (1986), 31 D.L.R. (4th) 712 (S.C.C.).

What it means in practice is that, like legislatures, the courts have the power to impose reasonable limits on *Charter* rights in some situations.[39]

This brings us to the second case under consideration, where the courts assess statutes passed in the pre-*Charter* era, or more precisely, before the particular *Charter* provision in question came into effect.[40] This activity resembles a second-order function since it involves the review of provisions enacted by other bodies. On the surface, of course, there may be little to distinguish a pre-*Charter* statute from one passed after the *Charter* took effect. The essential difference, for our purposes, is that in the first case the statute does not represent the judgment of a body bound by the *Charter* at the time of enactment, while in the second case it does. Since second-order functions involve making decisions as to whether another body was right in its application of *Charter* standards, it can be seen that, strictly speaking, this is impossible where the statute predates the *Charter*. Rather, a court is simply deciding as a matter of abstract principle whether the statute in question complies with the *Charter*.

The significance of this distinction will emerge below, where it is argued that first-order judgments under the *Charter* may in some contexts enjoy a degree of deference from bodies exercising review functions. By contrast, where a court is reviewing an enactment passed before the *Charter* took effect, the enactment may not be entitled to any special deference from the court.[41] As MacKinnon, A.C.J. remarked in response to an argument that a certain statute should enjoy a presumption of constitutionality in face of the *Charter*, "The supreme law was enacted long after the

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[39] Compare the approach of the Supreme Court in *R.* v. *Mannion*, *ibid.* at 720, where McIntyre J. briefly considered the argument that a common law rule posed a reasonable limit on a Charter right under section 13, and dismissed the argument on substantive grounds, without coming to terms with the Court's role in generating the common law.

[40] Section 15 of the Charter, it will be remembered, only took effect in 1985, three years after the other Charter provisions.

[41] As Justice Beetz explains in *Attorney General of Manitoba* v. *Metropolitan Stores Ltd*, [1987] 1 S.C.R. 110 at 121-25, this result flows from the innovative character of the *Charter* in relation to the existing legal system. However, with respect, the arguments advanced by Justice Beetz in that case do not necessarily carry the same force with respect to statutes passed *after* the *Charter* took effect.

Juvenile Delinquents Act and there can be no presumption that the legislators intended to act constitutionally in light of legislation that was not, at that time, a gleam in its progenitor's eye."[42]

Nevertheless, the distinction between pre-*Charter* and post-*Charter* legislation is not a hard and fast one. Many of the rights and freedoms guaranteed by the *Charter* have long played a significant role in our political and legal culture. It would clearly be wrong to assume that pre-*Charter* legislatures and governments uniformly failed to give serious consideration to the impact of legislation on basic human rights, for in some cases they clearly did.[43] In such instances, a court reviewing the statute in question may effectively be exercising a second-order function, and the statute may be entitled to the same degree of deference that post-*Charter* legislation may enjoy.

Of equal interest is the courts' duty in relation to the common law, which is our third case. The Coordinate Model argues that the courts have a general constitutional obligation to develop and apply the common law so that it conforms with the *Charter*, even if their decisions cannot be reviewed by any other court or body. This duty to develop the common law is not confined to rules governing the operation of the executive and legislative branches or the interaction of government and private individuals. It also extends to the common law governing relations between private parties.

The general point was accepted by the Supreme Court of Canada in the *Dolphin Delivery* case, where Justice McIntyre states:

> Where ... private party 'A' sues private party 'B' relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the

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[42] *Re Southam Inc. and The Queen (No. 1)* (1983), 146 D.L.R. (3d) 408 at 420 (Ont. C.A.).

[43] For a striking example, see *Edwards Books and Art Ltd* v. *The Queen* (1986), 35 D.L.R. (4th) 1 (S.C.C.).

> purported assertion of *Charter* causes of action or *Charter* defences between individuals.[44]

The Court holds, then, that while the *Charter* does not directly bind private individuals, it mandates the courts to develop the common law governing private relations so as to bring it into reasonable conformity with *Charter* values. But it may be argued that the mandate should be carried out with caution. Insofar as many of the *Charter* rights and freedoms are *mainly* concerned with upholding public values, the courts should be circumspect in extending those values into areas that traditionally have been preserves of personal autonomy. Ideally, they should proceed on a case-by-case basis, gradually building up a body of jurisprudence, rather than attempting to lay down a priori principles governing entire fields of endeavour.[45]

The conclusion that courts have the duty to develop and apply the common law in accordance with the *Charter* has important implications. Private individuals and groups owe a wide range of duties to others either directly, under common law rules ordaining the performance of certain actions, or indirectly under consensual arrangements recognized and enforced at common law. If courts are bound by the *Charter* in administering the common law in such instances, private relations will be indirectly affected.

Take for example an instance where a landlord stipulates in a lease that the tenant may not sublet the property to persons of a certain race. A court asked to enforce this stipulation would have to determine whether it can be countenanced at common law in light of the *Charter* guarantee of racial equality under the law (section 15). The court might well determine that the *Charter*

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[44] *Supra*, note 29 at 198. For critical appraisal of the *Dolphin* decision, see D. Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37 U.T.L.J. 183; P.W. Hogg, "The Dolphin Delivery Case: Application of the *Charter* to Private Action" (1987) 51 Sask. L. Rev. 273; and B. Slattery, "The *Charter*'s Relevance to Private Litigation: Does *Dolphin* Deliver?" (1987) 32 McGill L.J. 905.

[45] For a more extended argument to similar effect, see B. Slattery, "Charter of Rights and Freedoms - Does It Bind Private Persons?" (1985) 63 C.B.R. 148, and the assessment of this argument in J.D. Whyte, "Is the Private Sector Affected by the Charter?" in L. Smith et al. eds, *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) at 145-86.

modifies the common law so as to invalidate contractual terms purporting to bind parties to engage in racial discrimination. It may be noted, however, that this conclusion does not in itself entail a direct *Charter* duty on individuals not to discriminate; it simply means that the common law will not enforce an agreement that purports to oblige a party to discriminate. That is, on the view espoused in *Dolphin Delivery*, the *Charter* instructs the courts to withhold legal force from certain private arrangements; it does not require people positively to do anything, or prevent them from entering into non-binding arrangements.

Nevertheless, in other cases the *Charter* arguably imposes indirect duties on individuals through the medium of the common law. Take the example of a private employer who dismisses an employee for supporting a particular political party. On a suit by the employee for wrongful dismissal, a court might interpret the common law in light of the value attached to freedom of expression in section 2 of the *Charter* and the limits permitted in section 1 and hold that the employer acted wrongfully. Such a decision would entail that an employer is bound at law to respect the employee's freedom of expression in certain contexts. It does not seem to make much difference in practice whether we say that this obligation flows from the common law (as interpreted in the light of the *Charter*) or from the *Charter* itself (as moulded by the common law under section 1); but in light of the ruling in *Dolphin Delivery*, it would seem that the former way of expressing the matter is preferable.

Finally, the courts have the duty to take the *Charter* into account in interpreting ambiguous enactments and a companion duty to apply even unambiguous provisions in a way that observes *Charter* standards of reasonable respect for basic rights. In other words, a court's responsibilities under the *Charter* do not cease once an enactment has been brought over the threshold of *Charter* compliance; they govern every aspect of a court's operations in giving the enactment practical effect.

IV. RELATIONS BETWEEN FIRST-ORDER AND SECOND-ORDER BODIES

The differing themes represented by the Judicial and Coordinate Models run in deep currents beneath the surface of many debates concerning the respective roles of legislatures and courts under the *Charter*. I have chosen two areas where the differences seem particularly striking: (1) reasonable limits on *Charter* rights under section 1; and (2) the use of notwithstanding clauses under section 33. It will not be possible to offer complete accounts of these topics; each one would merit a paper to itself. My object is simply to indicate the diverging lines of argument that flow from the two models of the *Charter*, so as to give a better basis for judging their relative merits.

A. *Reasonable Limits on Charter Rights*

Section 1 provides that the *Charter* guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In what context should this provision be understood? In particular, what are the respective roles of first-order and second-order bodies in applying the standard laid down? In considering this question, I will focus on the example of courts acting in a review capacity with respect to laws enacted by governments and legislatures. But the discussion can be extended, with suitable modifications, to other sorts of contexts where second-order actors assess the acts of others for conformity with the *Charter*.

As seen earlier, the Judicial Model holds that courts alone have the mandate to apply *Charter* standards and they alone are competent to do so. Members of the executive and legislative branches have no constitutional duty to take account of the *Charter* in drafting and enacting legislation. Their only mandate is a non-legal one: to further the interests of the citizenry as a whole or particular groups within that body, or, on a more cynical view, to maintain their own grip on power. They do not have to consider

whether proposed legislation infringes *Charter* rights or whether such an infringement can be justified under section 1.

It can be seen, then, that according to the Judicial Model section 1 is directed exclusively at courts acting in a review capacity. It provides them with a standard for assessing the legitimacy of governmental acts that arguably interfere with *Charter* rights.[46] So, the section must be understood in the adversarial context that characterizes most judicial proceedings, where one party argues that a certain act violates the *Charter* and another party seeks to uphold the act. In this context, section 1 can plausibly be read as imposing on the party upholding the act the burden of justifying it. As Dickson C.J.C. states in *R.* v. *Oakes*:

> The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of section 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking section 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrable" which clearly indicates the onus of justification is on the party seeking to limit....[47]

A second consequence of this viewpoint is that courts, in reviewing a statute that arguably limits *Charter* rights in an unjustified way, need not, and indeed *should* not, show any deference to a governmental decision to pass the statute, even where the decision has been made after the relevant *Charter* provision came into effect. The reason is that, in principle, the governmental decision is based on factors alien to those controlling the court's assessment. For a court to show deference to such a decision would be for it to relax the constitutional standards laid

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[46] See P.C. Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984-85) 18 U. Mich. J. L. Ref. 51 at 61:

> Experience has demonstrated that although in the abstract such fundamental rights as freedom of speech may seem unabridgable, in practice they must be restricted when they conflict with the rights of others or with the needs of the community. In the Canadian context, the evolution of section 1 of the Charter clearly indicates that the judiciary, not Parliament, is the institution responsible for drawing the line.

[47] (1986), 26 D.L.R. (4th) 200 at 225-26 (S.C.C.).

down in the *Charter* in favour of "political" and other "non-legal" factors and so doing to abdicate its particular responsibility to protect basic rights from unwarranted governmental invasion. Even where it can be shown that a government actually took into account the relevant *Charter* standards in coming to its decision a court would have no good reason to defer to that decision because a government or legislature is (on this view) not equipped to apply the standards in the proper way. In summary, according to the Judicial Model, courts have a free hand to determine whether a governmental act infringes a *Charter* right, and, where it does, whether it can be justified under section 1.

This view of the *Charter* should give us pause. It suggests in effect that the judiciary is the only "principled" branch of government, that legislatures and executive bodies have no mandate to uphold the Constitution and so may be expected to violate it as a matter of course. But our constitutional traditions run deeply in another direction. Thus the division of powers between federal and provincial legislatures in the *Constitution Act, 1867* has never been understood merely as a set of directives to courts to invalidate laws that exceed the specified jurisdictional boundaries; rather it is ordinarily understood as a code governing the conduct of the executive and legislative branches, as well as the judiciary. This basic understanding informs much of our reasoning about various aspects of the Constitution. It underlies, for example, the following statement of Justice Fauteux in *Re Farm Products Marketing Act*:

> There is a *presumptio juris* as to the existence of the bona fide intention of a legislative body to confine itself to its own sphere and a presumption of a similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature.[48]

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[48] [1957] S.C.R. 198 at 255. This passage was quoted with approval by Ritchie J. in *Nova Scotia Board of Censors* v. *McNeil*, [1978] 2 S.C.R. 662 at 687-88, where the opinion of Strong J. in the early case of *Severn* v. *The Queen* (1878), 2 S.C.R. 70 was also cited as authority. In the latter case, Strong J. stated at 103:

> As this Court is now, for the first time, dealing with a question involving the construction of that provision of the *British North America Act* which prescribes the powers of the Provincial Legislatures, I do not consider it out of place to state a general principle, which, in my opinion, should be applied in determining questions relating to the constitutional validity of Provincial Statutes. It is, I consider, our duty to make every possible presumption in favour of such Legislative Acts, and to

The presumption referred to here only makes sense on the supposition that a Canadian legislature has a responsibility to respect the constitutional limits imposed on its authority and that it normally carries out this responsibility.

It is also worth remembering that, whatever wrongs our governments have committed in the past (and I do not mean to downplay them), it remains true that the measure of freedom, equality, and social justice Canadians enjoy today is in no small part the work of these bodies. Courts have not been the sole or even principal custodians of basic rights in Canada. Much has been accomplished through the normal democratic processes that characterize the operation of our governmental and legislative institutions. Should these institutions now be treated as constitutionally irresponsible under the *Charter*?

The Coordinate Model maintains that they should not. It holds that the main responsibility for applying the *Charter* rests on first-order actors, among which executive bodies and legislatures figure prominently, along with the courts. These institutions have the mandate to apply *Charter* standards to their own conduct and to ensure that, where that conduct stands to impinge on *Charter* rights, it is reasonable and demonstrably justified under section 1. The Coordinate Model views that section, then, as providing a standard governing the conduct of first-order actors and holds that its meaning can only be grasped in the institutional context of the particular first-order actor in question.

Thus, for example, where a government is considering the introduction of legislation that imposes stricter controls on the distribution and sale of pornographic literature, it has the constitutional duty to consider seriously the impact of any such measure on freedom of expression and the extent to which it may be justified in a free and democratic society. In this context, unlike in a court, there are no well-defined "parties" opposing or upholding

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endeavour to discover a construction of the *British North America Act* which will enable us to attribute an impeached Statute to a due exercise of constitutional authority, *before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it...*" (emphasis added).

an already completed act or existing rule of law. It would be artificial to try and determine who should bear the "burden of proof" and quite unclear what the object of the burden might be. The question confronting the government is whether any legislation should be introduced at all, and if so, what shape it should take. At this stage, the debate over the application of *Charter* standards is necessarily fluid and takes place in a wide variety of contexts, ranging from meetings of Cabinet to the silent ruminations of governmental drafters.

So the requirement in section 1 that any limits on *Charter* rights be reasonable and demonstrably justified relates, in this context, to such matters as the seriousness with which a government must regard the *Charter* right in question and the care it must take in drafting any measures that limit that right. Where a government carries out this mandate, it cannot necessarily be assumed that its decision will be based on the wrong sort of factors or be intrinsically flawed as "political" in nature. It would be equally wrong to view the decision as irrelevant to what a court should hold when reviewing the matter at second remove.

The view that section 1 is directed at first-order actors, remarkably enough, has attracted the more recent support of Chief Justice Dickson in *Edwards Books and Art Ltd* v. *The Queen*. In a significant emendation of the *Oakes* holding, he writes:

> In balancing the interests of retail employees to a holiday in common with their family and friends against the section 2(a) interests of those affected *the legislature engaged in the process envisaged by section 1 of the Charter*. A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for *the Legislature* to impose. *The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line....* The exemption in section 3(4) of the *Act* under review in these appeals represents *a satisfactory effort of the part of the Legislature of Ontario to that end* and is, accordingly, permissible.[49]

It is clear from this passage that section 1 is viewed as applying primarily to the body responsible for making the decision in the first instance (here the legislature) and only in a secondary and derivative way to the court reviewing that decision. The Chief Justice's statement is all the more significant given that the

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[49] (1986), 35 D.L.R. (4th) 1 at 51 (S.C.C.) (emphasis added).

legislation under review stemmed from the pre-*Charter* era. Nevertheless, the Chief Justice was able to hold that the legislature took into account the same sort of factors that it would have had to consider under the *Charter*, that it did so properly, and that its decision therefore merited the respect of the Court.

The Coordinate Model, then, throws significant new light on section 1 and the roles of various constitutional bodies bound by the *Charter*. But I do not mean to suggest that it results in only one possible view of the relationship between legislatures and review courts in the application of *Charter* standards, namely that the latter ought in all cases to be governed by a deferential attitude in their dealings with the former. In fact, the merit of the Coordinate Model is that it allows us to entertain *a variety of differing models* in attempting to understand the respective roles of first-order and second-order actors. I will outline several of these models and make a few suggestions as to their possible relevance in the *Charter* context without attempting to reach any final conclusions on the matter. The first model imagines a situation where the first-order actor has a duty to comply with the standards in question but also plays a role which may lead the actor on occasion to ignore or deliberately violate the standards in order to gain some advantage. Thus, for example, a hockey player's desire to win the game may tempt him to overlook certain rules if he thinks he can get away with it. So the referee usually does not owe any deference to the decisions of the first-order actors (that is, the players) and quite properly substitutes his own judgment for theirs on questions of rule-compliance. An inspector scrutinizing fish-canning factories for conformity with governmental standards is probably in a similar position, as is a criminal court judging citizen compliance with certain criminal provisions. In cases of this kind, the second-order actor performs the function of keeping the first-order actors in line, or of resolving disputes as to whether or not they have broken the rules, or of informing and educating them as to the proper interpretation and application of the standards in question, or a combination of these.

A second model, which is perhaps a variation on the first, is exemplified by a court hearing an appeal from the rulings of a trial court. Here the appeal court is under no obligation to defer to the trial court's findings on the law, but it will normally show

considerable deference to their findings of fact. The reason for the latter is that the trial court is considered better placed to determine the facts, as established by witnesses and other evidence. This is not, however, the case with the law, and here appeal courts normally feel free to substitute their own judgment for that of the trial judge on the ground that they are better qualified to determine what the law requires. Note that this second model differs from the first in that the review power is not founded on the premise that the trial court's role is such as to lead it to disregard or violate the standards in question. This, of course, may happen on occasion, but it is not built into the trial judge's role, as it clearly is with players engaged in a game.

A third model is supplied by the relationship between courts and administrative tribunals. In Canada, the courts have held that the decisions of administrative bodies should generally only be interfered with (in cases not involving excess of "threshold" jurisdiction) where the decisions are patently unreasonable.[50] Here the deferential posture of the courts is based on such factors as "the qualifications of the tribunal, the specialised nature of the area regulated and, as in the case of the professions and the universities, a history of self-regulation ...,"[51] that is, generally, factors which speak to relative institutional competence and, in the second case, to the value of autonomous self-regulation. The latter factor should not be under-estimated because it is common experience that overly close supervision of first-order actors may lead to a sense of frustration, a reluctance to take "risks," or a tendency to conceal or disguise the true basis of decisions taken.

Which (if any) of these models is most apt to describe the respective roles of legislatures and review courts under the *Charter*, and more generally the relationship of first-order and second-order

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[50] See *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corporation* (1979), 97 D.L.R. (3d) 417 at 424-25 (S.C.C.); *Re Alberta Union of Provincial Employees and Board of Governors of Olds College* (1982), 136 D.L.R. (3d) 1 at 7 (S.C.C.); *St. Luc Hospital* v. *Lafrance* (1982), 136 D.L.R. (3d) 577 at 584-85 (S.C.C.); and the valuable discussion in D. Mullan, "Judicial Deference to Administrative Decision-Making in the Age of the Charter," *supra*, note 21.

[51] D. Mullan, *ibid.* at 206.

actors? The question cannot be fully treated here. But several observations may be made.[52]

The issue of relative institutional competence is obviously important, and it may point in different directions depending on the subject-matter. In some instances, governments and legislatures may be better-equipped than courts to determine and weigh the factors germane to a finding of reasonableness under section 1 or indeed to the interpretation and application of the substantive *Charter* section. Thus in *Public Service Alliance of Canada* v. *The Queen*, Chief Justice Dickson observes:

> In my opinion, courts must exercise considerable caution when confronted with difficult questions of economic policy. It is not our judicial role to assess the effectiveness or wisdom of various government strategies for solving pressing economic problems. The question how best to combat inflation has perplexed economists for several generations.... A high degree of deference ought properly to be accorded to the governments' choice of strategy in combatting this complex problem.... The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the *Charter*.[53]

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[52] For further discussion, see M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry," *supra*, note 18 at 154-59; P.W. Hogg, *Constitutional Law of Canada*, *supra*, note 8 at 96-100; and D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 56-59.

[53] [1987] 1 S.C.R. 424 at 442. In *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500, La Forest J. states at 523:

> What has to be determined is whether or not, in the particular circumstances of the case, surrender of a fugitive for a trial offends against the basic demands of justice. In determining that issue, the courts must begin with the notion that the executive must first have determined that the general system for the administration of justice in the foreign country sufficiently corresponds to our concepts of justice to warrant entering into the treaty in the first place, and must have recognized that it too has a duty to ensure that its actions comply with constitutional standards. Blind judicial deference to executive judgment cannot, of course, be expected. The courts have the duty to uphold the Constitution. Nonetheless, this is an area where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states. In a word, judicial intervention must be limited to cases of real substance.

See further, *Argentina* v. *Mellino*, [1987] 1 S.C.R. 536 at 559, La Forest J.: "[A court] should not lightly assume that the executive has ignored its undoubted duty to ensure that its actions conform to constitutional requirements ..."; and *United States* v. *Allard*, [1987] 1 S.C.R. 564 (S.C.C.) at 572-73, La Forest J.

In other instances, a review court may possess knowledge and expertise equal or superior to that of the first-order body, and so be in a stronger position to substitute its own assessment of the *Charter*'s requirements for that of original actor. Justice Lamer singles out this factor in *Re Section 94(2) of the Motor Vehicle Act*,[54] where he holds that the principles of fundamental justice referred to in section 7 of the *Charter* are to be found in the basic tenets of our legal system: "They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system."[55] Within this domain, it may be inferred, a court stands on relatively solid ground in scrutinizing a statute for conformity with the *Charter*.[56]

Other factors need to be taken into account. A governmental determination that a certain limitation is reasonable or unreasonable does not bind the hands of future governments and legislatures; mistakes can be remedied with relative ease, and changes in public standards can be accommodated. By contrast, even under a flexible doctrine of precedent, court decisions on these matters may not be so easily reversed. So in areas where there is the prospect of fairly rapid social change, it might be imprudent for a court to attempt to describe in detail the correct configuration of a breaking wave.

A third factor, which cuts the other way, is that the complex roles played by governments and legislatures may in some cases lead them to downplay or ignore *Charter* standards in the interest of attaining other, ostensibly more pressing, goals. History suggests, moreover, that governments are more susceptible than courts to the shifting tides of public opinion, which cannot always be trusted to

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[54] *Supra*, note 7.

[55] *Ibid.* at 550.

[56] See, nevertheless, *Jones* v. *The Queen* (1986), 31 D.L.R. (4th) 569 at 598 (S.C.C.), where La Forest J. comments with reference to provincial obligations under section 7 of the *Charter*: "The provinces must be given room to make choices regarding the type of administrative structure that will suit their needs unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of *fundamental* justice."

respect the rights of minority groups, particularly in times of crisis or want.

These diverse reflections indicate that it would not be helpful to try to formulate rigid principles defining in advance the appropriate relations between second-order and first-order actors under the *Charter*. While in some instances a posture of judicial deference to governmental decisions may be justified, this need not always be the case. By the same token, it would be wrong to assume that courts should generally feel free to substitute their own assessment of reasonableness for that of a legislature. In effect, I think that the appropriate role of a review court can only be determined on a case by case basis, in light of factors such as those outlined above.

Judicial review of governmental decisions under the *Charter* is affected by another matter that we have so far ignored: the constitutional value of regional autonomy underlying the Canadian federal system. The Confederation compromise rests on the premise that decisions affecting many important sectors of activity are better made by locally elected bodies than by a national Parliament. The large degree of autonomy given to provincial bodies may be supported on a number of grounds. Circumstances vary from region to region, and so a uniform legislative response to a certain problem may be less appropriate than responses individually tailored to each region. Even assuming a basic similarity of circumstance, opinion may differ from region to region as to the suitability of certain measures. The value of a law cannot be measured strictly by its intrinsic worth, apart from the question of how far those governed by the law agree with it or have had the opportunity to contribute to its formation. A federal constitution recognizes the value of local citizen participation in the formation of governmental policies and laws, by bringing important governmental institutions closer to local communities and giving people greater opportunities to affect the running of government.[57]

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[57] For discussion of this factor, see Charles Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" in A. Cairns & C. Williams eds, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) at 183-229, esp. at 205-25.

In any case, a measure that arguably is good for the country as a whole or for a majority of its regions may have adverse effects on particular provinces. In many sectors, our Constitution has opted to prefer the provincial viewpoint to the national one and so allowed local communities to prevent their own interests from being swallowed up in global calculations. Federalism also enhances the opportunities for social experimentation while minimizing the impact of unsuccessful experiments by allowing new policies to be tested in a single province before being adopted more broadly.

The Judicial Model has difficulty in taking proper account of federalism. For it views the *Charter* as directed exclusively at the courts, and the judicial system in Canada is a largely unitary one, which does not reflect the federal principle to nearly the same degree as our governmental and legislative arrangements. So, on the Judicial Model, it would be natural to suppose that the Supreme Court of Canada is ultimately responsible for the interpretation and application of *Charter* standards and that its decisions will, over time, generate a jurisprudential code uniformly binding on courts across Canada. In this scheme, it is not easy to see what role is left for local input, and only too easy to imagine the effect of a uniform body of *Charter* case-law on the autonomy of provincial institutions.

The Coordinate Model does not experience problems of this kind. In viewing the *Charter* as directed primarily at first-order actors, it routes much of the important decision-making under the *Charter* through the existing structure of federal and provincial governments and legislatures.[58] They are the ones initially responsible for the application of *Charter* standards, and it is only to be expected that their appreciation of the significance of those standards, and in particular the reasonableness of limitations on *Charter* rights, should differ. These differences of opinion are not

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[58] I say "much," because it must be remembered that the *Charter* also binds courts in a first-order way, in particular in the interpretation of the common law. In this field, there would seem to be greater opportunity for the generation of uniform standards.

only to be expected, under federalism they are to be welcomed and respected.[59]

It follows that courts, sitting in review on governmental decisions under the *Charter*, should be prepared to accord significant weight to the values implicit in federalism in reaching their decisions. For although the *Charter* clearly limits the powers of the individual governments created by the federal scheme, it does not alter the scheme as such. The division of powers between federal and provincial governments is as much a part of the Constitution as the *Charter*. So the temptation to think that there can be only *one* standard for Canada as to the nature of *Charter* rights and the reasonableness of limits on them should be resisted. The Coordinate Model provides a strong structural basis for this viewpoint.

B. *The Use of Notwithstanding Clauses*

Under section 33(1) of the *Charter*, a legislature may expressly declare in an Act that the Act as a whole or some of its provisions shall operate notwithstanding a provision found in sections 2 and 7-15. These sections contain some of the *Charter*'s most basic guarantees, including freedom of conscience, freedom of expression, freedom of assembly, freedom of association, and equality rights. Section 33(2) provides that where such a declaration is in effect, the Act covered by the declaration "shall have such operation as it would have but for the provision of this *Charter* referred to in the declaration." A declaration ceases to have effect five years after it comes into force, or on some earlier date specified in the declaration; but it is subject to reenactment.[60]

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[59] As Justice LaForest observes in *Edwards Books and Art Ltd* v. *The Queen*, *supra*, note 49 at 72: "The simple fact is that what may work effectively in one province (or in a part of it) may simply not work in another...."

[60] Sections 33(3) and 33(4).

The place of notwithstanding clauses in the overall scheme of the *Charter* has been widely recognized as problematic.[61] Part of our difficulty in dealing with the matter is traceable to a failure to distinguish clearly between several similar issues, which the Coordinate Theory shows to be quite distinct.

The *first* and most fundamental issue is this: where a bill is accompanied by a notwithstanding clause, is the enacting legislature under any constitutional duty to ensure that the substance of the bill complies with the *Charter* provisions covered by the notwithstanding clause? That is, does the presence of a notwithstanding clause relieve a legislature of any duty it might otherwise have to scrutinize the bill for conformity with the relevant *Charter* standards?

The *second* issue focuses more narrowly on the legislative decision to enact the notwithstanding clause proper, as distinguished from the substance of the bill. Is a legislative decision to enact a notwithstanding clause subject to any constitutional standards or preconditions, other than the manner and form requirements set out in section 33? Or is it free to enact such a clause on any grounds and in any circumstances?

These initial issues, then, concern the first-order duties of legislatures in using section 33. The remaining issues address the second-order role of the courts. The *third* issue asks whether a court may scrutinize a statute containing a valid notwithstanding clause to determine if the statute's *substance* conforms with a *Charter* provision covered by the clause. That is, does a valid notwithstanding clause completely preclude a court from assessing the statute's content under the relevant *Charter* standards?

The *fourth* and final issue deals with a court's powers to determine the validity of the notwithstanding clause proper. Can a

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[61] See generally *Alliance des Professeurs de Montreal* v. *Attorney-General of Quebec* (1985), 21 D.L.R. (4th) 354 (Que.C.A.); D.J. Arbess, "Limitations on Legislative Override Under the Canadian Charter of Rights and Freedoms: A Matter of Balancing Values" (1983) 21 Osgoode Hall L.J. 113; D. Gibson, *The Law of the Charter: General Principles*, *supra*, note 52 at 124-31; P.W. Hogg, *Constitutional Law of Canada*, *supra*, note 8 at 690-92; D. Greschner and K. Norman, "The Courts and Section 33," forthcoming in the Queen's Law Journal; S.A. Scott, "Entrenchment by Executive Action: A Partial Solution to 'Legislative Override'" (1982) 4 Sup. Ct L. Rev. 303; B. Slattery, "Canadian Charter of Rights and Freedoms - Override Clauses under Section 33 - Whether Subject to Judicial Review under Section 1" (1983) 61 C.B.R. 391; P.C. Weiler, "Rights and Judges in a Democracy: A New Canadian Vision," *supra*, note 46 at 79-92.

court ascertain if the legislative decision to enact the clause conforms with any constitutional standards controlling that decision (beyond the formal requirements of section 33)?

The Judicial Model yields a uniform set of negative answers to these enquiries, which obviates any need to distinguish clearly among them. Under this Model, at no time does a legislature have any constitutional duties under the *Charter*. All that the *Charter* does is to add a veneer of judicial review to the old constitutional furniture. *A fortiori*, a legislature has no obligation to ensure that a statute with a notwithstanding clause conforms with the *Charter* provisions covered by the clause, and its decision to enact such a clause is not controlled by any substantive (as opposed to formal) constitutional standards. Moreover, a notwithstanding clause eliminates the possibility of judicial review. A court has no power to review the content of legislation covered by a notwithstanding clause in the relevant respect. Likewise, it probably has no ground upon which to challenge a legislature's decision to enact such a clause, so long as the procedures specified in section 33 have been observed.

The startling conclusion is that the rights in sections 2 and 7-15 of the *Charter* are not actually constitutionally entrenched.[62] Their operation can be suspended by a statutory provision passed in the normal manner, which can be reenacted indefinitely. Moreover on this view, far from ensuring that certain fundamental rights are not infringed, the *Charter* concedes that they *can* in fact be infringed, and infringed unreasonably – a disquieting and paradoxical proposition. Is it possible for a *Charter of Rights and Freedoms* to recognize that fundamental rights may be suppressed *without reasonable grounds*?

The Coordinate Model opens a way out of these difficulties. In response to the first issue, it holds that a legislature is always under a first-order duty to comply with *Charter* standards in enacting a statute, even when the statute contains a notwithstanding clause. The effect of a valid notwithstanding clause is to curtail or eliminate judicial review, not to release a legislature from its constitutional

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[62] For an argument to this effect, see A.F. Bayefsky, "The Judicial Function under the *Canadian Charter of Rights and Freedoms*" (1987) 32 McGill L. J. 791 at 818.

responsibilities under the *Charter*. So when a government drafts a bill with a notwithstanding clause and a legislature considers it, they both have the duty to ensure that *in their judgment* the bill does not unjustifiably infringe any *Charter* rights, including those covered by the notwithstanding clause.

It might be thought that the Coordinate Model allows for a different sort of response to this issue. This maintains that, although a legislature is normally duty-bound to observe the rights guaranteed in sections 2 and 7-15 of the *Charter*, it can release itself from this duty by enacting a notwithstanding clause. So when a bill containing such a clause is introduced, the legislature has no constitutional obligation to ensure that the bill's content complies with the relevant *Charter* provisions. The basic difficulty with this view is that a notwithstanding clause has no legal effect until it is enacted. If a legislature ordinarily has a duty to comply with the *Charter*, it is hard to see how a notwithstanding clause can remove that duty. For the duty relates to the period *before* a statute's enactment, yet the clause takes effect only on enactment. So the clause's operation is confined to the subsequent period and can only affect the review powers of courts.

In reply, it could be argued that a notwithstanding clause has an absolving effect: it operates retroactively to relieve the enacting legislature of its duty to observe *Charter* standards. A legislature considering a bill containing a notwithstanding clause may justifiably anticipate this result and ignore the *Charter* provisions covered by the clause.

This argument, however, is weakened by the fact that a notwithstanding clause's life is limited to five years. Put yourself in the position of a legislature debating a bill that features such a clause. The legislature knows that the clause will expire after five years but the rest of the statute will remain in force indefinitely. It also knows that the clause can be reenacted on expiry, but it has no way of predicting whether that will happen, or whether it will continue to happen every five years as long as the statute exists. Given the possibility that the clause will ultimately be allowed to expire, does the legislature now have a duty to ensure that the bill conforms with *Charter* standards?

The question, I suggest, shows the flaw in the retroactive view. On that view, so long as the notwithstanding clause remains

in effect, the legislature will be retroactively relieved of its duty of compliance. But if the clause is allowed to expire, under section 33(3) it will "cease to have effect." Insofar as the clause retroactively frees the legislature of its constitutional duties, the expiry of the clause will retroactively reinstate them. So on the retroactive view, the legislature seems to be both bound and not bound to take account of *Charter* standards in debating the bill, which is of course impossible.

Nevertheless, it could be replied that the retroactive effect of a notwithstanding clause operates once and for all. When a clause takes force it retroactively relieves the enacting legislature of its duty, and this effect outlives the expiry of the clause itself. This interpretation seems inconsistent with the wording of section 33(3), which rules out such lasting effects. But the argument has the merit of inviting us to challenge its premises more directly. The fundamental objection to the retroactive view can be put simply. It is unreasonable to maintain that the existence of constitutional duties controlling a legislature's decision to pass a bill can depend on whether or not the legislature decides to pass the bill. The duties either exist at the time the bill is being considered or they do not. They cannot retroactively be expunged by the performance of the very act which the duties purportedly control.

These considerations suggest that, under the Coordinate Model, governments and legislatures are always bound to ensure that a bill does not impinge unreasonably on *Charter* rights, even where the bill contains a notwithstanding clause. We will adopt this premise in examining the remaining issues.

Turning now to the second issue, we must consider whether legislative use of section 33 is controlled by standards other than the formal ones specified in the section. It follows from what we have just said that a legislature would violate its first-order duties in using a clause to protect from judicial scrutiny an enactment that it considered unjustifiable under the *Charter*. If a legislature is always bound to respect *Charter* rights, as the Coordinate Model maintains, it is likewise bound not to use a notwithstanding clause to assist an unwarranted invasion of such rights. However this does not necessarily mean that the decision to enact a notwithstanding clause is subject to judicial review. That inference requires a separate (and more contentious) chain of reasoning, which we will consider shortly.

The duty not to use notwithstanding clauses to evade *Charter* standards is the most obvious constraint on a legislature's resort to section 33, but it is not necessarily the only one. Donna Greschner and Ken Norman have argued, for example, that a notwithstanding clause should only be employed in a remedial way, *after* legislation has already been considered by the courts and struck down; it should not be used preemptively, to block anticipated judicial review altogether.[63] This argument draws its strength from the plausible view that section 33 is intended to allow a further stage in the dialogue between courts and legislatures as to the meaning of *Charter* rights, not to prevent such dialogue altogether. The argument merits full and serious consideration, which cannot be given here.

In response to the third issue, which concerns the role of courts faced with a notwithstanding clause, the Coordinate Model agrees with the Judicial Model that a court cannot review legislation containing a *valid* notwithstanding clause for conformity with a *Charter* provision specified in the clause. While section 33 does not diminish the first-order obligations of legislatures, it clearly has the effect of allowing legislatures to hold in abeyance the review powers of courts. So long as a notwithstanding clause is in effect, the courts have no power to assess the statutory provisions that it covers.

The broad outlines of the Coordinate Model view of section 33 now begin to emerge more clearly. That section should be interpreted as empowering a legislature to shield statutes *from second-order judicial scrutiny*, not as allowing it to escape from its first-order *Charter* duties. It would be strange, for example, if section 33 permitted Parliament to restore capital punishment without considering whether this is an unjustifiably cruel and unusual punishment. The true view is that a legislature cannot under any circumstances put in place a punishment that it regards as unduly cruel, or (more importantly) to enact one *without regard to* the standards laid down in the *Charter*. Section 33 only permits a legislature to insulate its judgment from judicial review for a period

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[63] *Supra*, note 61.

of five years, with the possibility of renewal.[64] On this view, section 33 empowers a legislature to convert itself into a High Court of Parliament, with final word on the application of certain *Charter* provisions for a time. It does not give a legislature the mandate to ignore fundamental rights or to limit them unreasonably.

The most contentious point is that raised by the final issue. May a court review a legislative decision to invoke a notwithstanding clause and, in appropriate instances, declare the clause invalid, on grounds other than failure to meet the formal requirements of section 33?

It may be noted first that if one accepts the Greschner and Norman argument that a notwithstanding clause can only be used in response to a judicial ruling, it follows plausibly (if not necessarily) that a clause deployed in violation of this rule can be declared null by a court. Such a requirement, however, can be viewed as basically formal in nature. Here we are asking whether there are any *substantive* limits on the use of section 33 that a court may enforce.

We saw above that a legislature using a notwithstanding clause has the duty to ensure that the measure protected by the clause does not unjustifiably limit *Charter* rights. Given this premise, it seems at least arguable that where a statutory provision shielded by a nothwithstanding clause infringes the relevant *Charter* provision in a manner that *on no possible reasonable view of the relevant factors* could be justified in a free and democratic society, a court has the power to strike down the notwithstanding clause as itself unreasonable under section 1 of the *Charter*. In such a case a legislature would be employing a notwithstanding clause, not to protect its own reading of the *Charter* from judicial second-guessing, but to evade its duty to comply with the *Charter* altogether. Where this fact would be plain to any reasonable person studying the statute in light of the background materials, I think that a court might well be justified in refusing to countenance a legislative use of

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[64] Subject to the arguments considered below about outside limits on the use of notwithstanding clauses.

section 33.[65] It must be conceded, however, that the Coordinate Model does not necessarily lead to this conclusion, and indeed allows for quite different views.

It is also worth noting that a similar conclusion can be reached by another route. Under the terms of section 33, a legislature cannot enact a notwithstanding clause affecting the "Democratic Rights" embodied in sections 3-5 of the *Charter*, which include in particular the right to vote. So a provision protected by a notwithstanding clause can always be challenged for unreasonably limiting those rights. But it can be argued that the Democratic Rights have the collective effect of guaranteeing the essential preconditions of a free and democratic society. So, for example, the right to vote in section 3 presupposes the existence of conditions which render that right meaningful, such as the freedom to discuss openly basic social and political issues, the freedom to criticize the government and its policies, the freedom to assemble to listen to speakers on these topics, the freedom to associate with others in various political parties and interest groups, the freedom to mount candidates for political office, and so on.[66]

More generally, it can be pointed out that the universal character of the right to vote is premissed on the recognition of the right of every citizen to equal respect. On this view, any measures that deny that right in such a fundamental way as to render the universality of voting rights meaningless or incomprehensible are open to judicial review, even where they do not directly deny the right to vote. For example, a measure that confined the members of a minority racial group to separate and inferior educational facilites could arguably be struck down for denial of the right to equal respect underlying section 3, even if the measure were

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[65] For a detailed argument supporting this view, see B. Slattery, "Canadian Charter of Rights and Freedoms - Override Clauses under Section 33 - Whether Subject to Judicial Review under Section 1," *supra*, note 61.

[66] See *R.* v. *Big M Drug Mart Ltd* (1985), 18 D.L.R. 321 (S.C.C.), where Dickson J., discussing the purpose of the *Charter* guarantee of freedom of conscience and religion in section 2(a), states at 361: "... an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government."

protected by a notwithstanding clause excluding the application of sections 2 and 7-15. The reason is that any justification for the segregation measure in question must in the end deny the basic *rationale* for a universal right to vote.

These arguments for enforceable limits on the use of section 33 must not, however, be exaggerated or misunderstood as a covert attempt to read the section out of the *Charter*. To the contrary, they are designed to identify a legitimate sphere for the use of notwithstanding clauses while preserving the *Charter*'s integrity. Instances in which a court would be justified in nullifying a notwithstanding clause on substantive grounds will likely be few and confined to cases where the legislative measures are so extreme that they cannot be reconciled on any reasonable view with the basic democratic values animating the *Charter* as a whole.

V. CONCLUSION

The approach that I have taken to the *Charter* differs in several ways from current orthodoxy. One difference deserves particular emphasis. The approach is concerned as much with constitutional *duties* as it is with constitutional *rights*. Rather than asking simply what rights exist under the *Charter* and how they can be enforced, I have asked what persons and bodies are bound by the *Charter* and what their duties involve. These two lines of inquiry are in fact complimentary; a balanced view of the *Charter* would draw on both. I have emphasized the second one here because it best brings out the complexity and richness of the *Charter* and has been unjustly neglected.

Adopted in isolation, the rights-based approach results in a view of the *Charter* that is excessively individualistic and court-oriented and ignores the positive roles to be played by legislatures, governments, and society at large. In concentrating on the recipients of rights, this approach observes that most *Charter* rights are conferred on individuals and that where such rights are violated they are most readily enforced in the courts. Moreover, on the standard view, the courts can only enforce the *Charter* as against governmental agents as representatives of society. The *Charter*, then, is portrayed as a document giving individuals rights that are

enforceable in courts against society. Governments and legislatures are the potential villains of the piece, and individual rights are pitted directly against the broader social and political considerations underlying governmental action. Judges are presented as the ultimate mediators and potential saviours, with a mandate to uphold individual claims against threatening social forces.

This picture distorts the true character and operation of the *Charter*. To restore a proper balance we have to shift our focus from individuals and their rights to the question of what bodies are bound to respect and implement *Charter* rights and what their responsibilities entail. Legislatures and governments, along with the courts, have first-order duties under the *Charter*, and in some cases private individuals may also have what amount to first-order duties through the mediation of the common law. These duties take a variety of forms. In many instances they do not simply entail respecting *Charter* rights in the negative sense of not interfering with their exercise. The duties also entail maintaining and strengthening the conditions essential for a meaningful exercise of the rights.[67] All this involves making practical judgments as to how far *Charter* rights may justifiably be limited in light of other values — many of which are not directly represented in the *Charter*.

Thus in the case of statutes, it is for governments and legislatures to decide initially how *Charter* rights can best be implemented and supported and what sort of limits may rightly be imposed on them under section 1. Considerations going to the common good thus operate at an early stage to mold the rights of individuals as they are actually held in practice. Courts are, of course, entrusted with a review function in relation to legislative decisions affecting *Charter* rights. But in this context their role can at best be secondary and somewhat peripheral. Their impact is felt in only a minority of instances, and normally it operates in a negative manner. Pruning is no substitute for growth.

Legislatures and governments are not the only actors with first-order duties under the *Charter*. As we have seen, the courts have a direct responsibility to develop and apply the common law in

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[67] For a persuasive exposition of the view that basic individual freedoms can only be realized under certain social conditions, see Charles Taylor, "Atomism," in *Philosophy and the Human Sciences* (1985) at 187-210.

a manner consistent with basic *Charter* values. Large parts of our ordinary lives are regulated by the common law,[68] and here the courts have a role roughly similar to that played by legislatures in passing and amending statutes. Judges must decide how the common law can best be developed to reflect *Charter* values and also what limits can justifiably be imposed in the common good. Here again, social considerations should play a large part in molding judicial deliberations.

In short, the *Charter* is a mandate for principled action in furtherance of fundamental rights and the common good. The cast of actors includes not only the courts, but also legislatures and governments. The rights actually held by individuals under the *Charter* are to be determined by the joint action of these bodies, which should take place in a context where the larger interests of society figure prominently. That is, individual rights can only be *constituted* in practice by bodies that act on behalf of society at large.

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[68] In all Provinces save Quebec, where the *Civil Code of Lower Canada* (1866), a statutory creation, plays an equivalent role.